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Supreme Court, U.S.
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No. 00-964

In the Supreme Court of the United States

JAMES D. STOUT and SHIRLEY A. BROWN,
Petitioners,

v.

J.D. BYRIDER a/k/a DOCHERTY MOTORS, INC.;
T&J ACCEPTANCE CORPORATION,
d/b/a CARNOW ACCEPTANCE COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

LOUIS PAISLEY (0017498)
Counsel of Record
GARY W. JOHNSON (0017482)
WESTON HURD FALLON PAISLEY
& HOWLEY L.L.P.
2500 TERMINAL TOWER
50 PUBLIC SQUARE
CLEVELAND, OH 44113-2241
(216) 241-6602
(216) 621-8369 fax

Counsel for Petitioners

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

44PP

RESPONDENTS' STATEMENT OF THE QUESTIONS PRESENTED

1. Did the district court properly compel arbitration under the Federal Arbitration Act ("FAA"), and correctly determine that that FAA, not Ohio substantive law, governs the enforceability of the written arbitration agreements pursuant to the Supremacy Clause?

2. Did the district court properly compel arbitration with neutral, unbiased, and respected third-party tribunals when plaintiffs failed to produce any evidence that the arbitration agreements were unconscionable, and failed to present any evidence concerning the applicable rules of arbitration or fees?

3. Did the district court properly compel arbitration where the record evidence demonstrated a clear and unambiguous written agreement to arbitrate?

4. Did the district court properly exercise its discretion by refusing to certify a class comprised of all defendants' customers from the date of opening when: (a) the claims of the putative class lack commonality as each consumer complaint turns upon the evaluation of individual evidence; (b) plaintiffs' claims are not typical of other putative class members; and (c) plaintiffs are not adequate representatives of the putative class?

CORPORATE DISCLOSURE STATEMENT OF DOCHERTY MOTORS, INC., dba J.D. BYRIDER AND T&J ACCEPTANCE COMPANY, dba CARNOW ACCEPTANCE COMPANY

Pursuant to Rule 29(6) of the Rules of the Supreme Court of the United States, Docherty Motors, Inc., dba J.D. Byrider and T&J Acceptance Company, dba CarNow Acceptance Company, by and through their attorneys, submit their Corporate Disclosure Statement.

Docherty Motors, Inc., and T&J Acceptance Company are Ohio corporations. There are no parent corporations for Docherty Motors, Inc., or T&J Acceptance Company. No publicly held corporations own 10% or more of the stock of Docherty Motors, Inc., or T&J Acceptance Company.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is published at 228 F.3d 709. A copy of the opinion is included in Petitioners' Appendix A at 1a-14a.

The opinion of the District Court for the Northern District of Ohio concerning the arbitration issue is published at 50 F. Supp.2d 733. A copy of the opinion is included in Petitioners' Appendix B at 15a-31a.

The opinion of the District Court for the Northern District of Ohio concerning class certification is unpublished. A copy of the opinion is included as Petitioners' Appendix C at 32a-44a.

JURISDICTION

Rule 10 of the Rules of the Supreme Court of the United States provides that this Court may grant a petition for certiorari only for compelling reasons. The character of the issues presented for review by Petitioners does not fit within the examples set forth in Rule 10. The Sixth Circuit's decision in the instant case is not in conflict with another United States Court of Appeals on a particular matter, and does not conflict with a decision from a state court of last resort on an important federal question. Additionally, the Sixth Circuit has not departed from the accepted and usual course of judicial proceedings as to call for this Court's supervisory power.

Petitioners' sole basis for invoking this Court's discretionary jurisdiction is a perceived conflict with the Eleventh Circuit's decision in *Randolph v. Green Tree Financial Corp.*, 178 F.3d 1149 (11th Cir. 1999), *aff'd in*

part, rev'd in part, 2000 WL 1803919 (Dec. 11, 2000). Since the filing of Petitioners' writ for certiorari, this Court's reversed the Eleventh Circuit's refusal to compel arbitration of the consumer's claim.

In sum, Petitioners have not set forth a justifiable basis for invoking this Court's jurisdiction. For these reasons, and those explained below, there were no errors in the lower courts, and there is no basis for extending jurisdiction.

STATUTORY PROVISIONS INVOLVED

Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.*
Ohio's Consumer Sales Practices Act ("OCSPA"),
Ohio Rev. Code § 1345.01, *et seq.*
Truth-in-Lending Act ("TILA"), 15 U.S.C. § 1601, *et seq.*

STATEMENT OF THE CASE

I. Nature Of The Case

Petitioners, James D. Stout ("Stout") and Shirley A. Brown ("Brown"), sued Respondents, J.D. Byrider a.k.a. Docherty Motors, Inc. ("Docherty Motors"), and T&J Acceptance Corporation d.b.a. CarNow Acceptance Corporation ("T&J"), for declaratory judgment, fraud, violations of Ohio's Consumer Sales Practices Act ("OCSPA"), Ohio Rev. Code § 345.01, *et seq.*, and violations of the Truth-in-Lending Act ("TILA"), 15 U.S.C. § 1601, *et seq.*, arising from their individual purchase of used motor vehicles in 1998. Petitioners also sought to certify a nebulous and over-reaching class, which would have included every customer who ever purchased a vehicle at Docherty Motors since the company began business in 1995.

Respondents asserted that Petitioners' claims, regardless of merit, were subject to binding arbitration pursuant to the written contracts between the parties, and moved the district court to enforce the agreements and refer the matter to arbitration. Respondents also asserted that class certification was inappropriate as: (1) insufficient commonality existed among the putative class members; (2) Petitioners' claims are not typical of the putative class; and (3) Petitioners were not adequate representatives for the putative class.

After reviewing the extensive briefs submitted by the parties, and a videotape of Petitiioners' transactions, the district court correctly denied Petitioners' motion for class certification, and properly granted Respondents' motion to compel arbitration. The Sixth Circuit correctly affirmed the district court's rulings.

II. Course Of Proceedings And Disposition Below

Petitioners filed suit due to alleged problems they have experienced with used motor vehicles purchased at Docherty Motors. Plaintiffs alleged the following claims in their original complaint: (1) declaratory judgment under the Federal Arbitration Act ("FAA"); (2) violations of the OCSPA; and (3) fraud.[1] Plaintiffs also sought to certify a class described as:

> **All** consumers who purchased an automobile from the defendant, J.D. Byrider a.k.a. Docherty Motors, that was financed through the defendant, T&J Acceptance Corporation d.b.a. CarNow Acceptance Company, in the State of Ohio at any time **from 1993 through the present.** [R. 1, Complaint, at ¶25 (emphasis added)].

In their original complaint, Petitioners' only purported basis for federal jurisdiction was their request for declaratory judgment under the FAA.

On February 16, 1999, Respondents moved to dismiss Petitioners' complaint for lack of subject matter jurisdiction. Recognizing the jurisdictional deficiencies, on March 4, 1999, Petitioners filed an amended complaint purporting to set forth a TILA claim in an improper attempt to invoke federal jurisdiction. Petitioners' amended complaint did not modify the proposed class for certification.

On February 16, 1999, Respondents moved to stay proceedings and compel arbitration, asking the Court to enforce the arbitration agreements entered into by Petitioners. On March 9, 1999, Petitioners opposed Respondents' motion

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[1] In October, 1998, Stout filed a similar complaint (without TILA or class action allegations) in state court, which he later dismissed without prejudice.

to compel arbitration, but did not request a hearing. On April 22, 1999, Respondents filed a reply brief.

Finally, on February 16, 1999, Respondents moved to strike the class action allegations contained in the original complaint. On April 5, 1999, Petitioners moved to certify the proposed class, but did not request a hearing on their motion. Respondents opposed class certification, but requested a hearing, if necessary.

On June 7, 1999, the district court properly denied Petitioners' motion for class certification, and held that Petitioners' claims were not typical of the putative class, that insufficient commonality existed amongst the putative class members, and that Petitioners were inadequate representatives for the putative class.

On June 8, 1999, Respondents moved for summary judgment on all of Petitioners' claims. On that same day, Petitioners moved for partial summary judgment on their TILA claim. In subsequently dismissing Petitioners' amended complaint, the district court did not rule upon the parties' respective motions for summary judgment.[2]

On June 9, 1999, the district court denied Respondents' motion to stay the proceedings, but correctly granted Respondents' motion to compel arbitration. After reviewing the extensive record, including the videotape of Petitioners' transactions, the district court held that the arbitration agreements were enforceable under Ohio and federal law. Accordingly, the district court dismissed plaintiffs' amended complaint "without prejudice to reinstatement should further proceedings be needed after arbitration." [R. 50].

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[2] The district court also did not rule upon defendants' motion to dismiss plaintiffs' amended complaint for lack of subject matter jurisdiction.

Prior to the district court's rulings, Petitioners had ample opportunity to conduct written and deposition discovery. Respondents answered extensive written requests for production of documents. Petitioners deposed eight (8) of the individuals and corporate representatives.

Petitioners refused to submit their individual claims to binding arbitration, and filed this appeal. Petitioners asked the district court to stay enforcement of its order compelling arbitration, but the district court has not granted the requested relief. Respondents stand ready to speedily resolve Petitioners' claims through arbitration as set forth in the individual agreements, and as ordered by the district court.

III. Statement Of The Facts[3]

A. Docherty Motors and T&J Are Small, Closely-Held Ohio Corporations That Sell Used Motor Vehicles, Provide Financing for Those Purchasers Who So Opt, and Offer Servicing and Repairs for Their Customers.

Docherty Motors is a small, family owned, and closely-held Ohio corporation with only four shareholders, and has been in the business of selling used motor vehicles since 1995. Only one shareholder is a non-family member. At the time of this lawsuit, Docherty Motors owned three J.D. Byrider franchises in northern Ohio, located in

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[3] Not only do plaintiffs mischaracterize deposition testimony, but they also cited deposition testimony in their briefs before the Sixth Circuit that **is not** part of the record. [*See* Appellant's Brief, at 4-7]. Pages 28, 43, 55-56, 64, 78, and 107 of Tom Docherty's transcript, and pages 20, 28, 36, and 71 of Jim Smith's transcript are not part of the record as cited by plaintiffs.

Sandusky, Medina, and Akron, and maintains a corporate office in Amherst, Ohio.

Contrary to Petitioners' representation, each used motor vehicle offered for sale by Docherty Motors is not "priced at $7,000.00." [Petitioners' Brief, at 2]. Rather, Docherty Motors seeks to purchase and resell used motor vehicles that fall within a certain resale value range. Docherty Motors generally does not purchase and resell vehicles that fall substantially above or below this acceptable range.

While customers have made cash purchases of used motor vehicles from Docherty Motors, and have also obtained financing from traditional third-party sources such as banks and credit unions, Docherty Motors does offer financing through T&J to those individuals who may not qualify for traditional financing. T&J finances transactions involving individuals with unfavorable credit records, but also finances transactions for customers with favorable credit records. For those sales financed internally, Docherty Motors assigns the retail installment contracts to T&J. [R. 49, Exhibits A, B, C, D, and E].

T&J is also a small, family-owned, and closely-held Ohio corporation, but with only two shareholders. Both shareholders are family members. T&J owns three CarNow Acceptance Corporation ("CNAC") franchises. A CNAC franchise is located at each Docherty Motors' dealership. [R. 28, Exhibits 2; R. 49, Exhibits A, B, C, D, and E].

Docherty Motors maintains a service department at each dealership, which performs repairs only on vehicles purchased at Docherty Motors. It generally purchases its vehicles from a limited group of wholesalers, against which it has full recourse to return the vehicle if it is defective. By dealing with the same wholesalers, Docherty Motors seeks to purchase higher quality used vehicles within its pricing criteria. [R. 49, Exhibits A, C, F, G, and O].

Before sale, each vehicle is inspected by a Docherty Motors' buyer and salesman. All vehicles sold are "safety checked." A customer may bring the vehicle into the service department for a safety check and free repairs on certain, specified items pursuant to a "We Owe" agreement if the repairs were not done before sale. The Buyer's Guide, affixed on a window in every vehicle, urges customers to take vehicles for a pre-purchase inspection at a mechanic of their choice. [R. 28, Exhibit 2, at 91; R. 49, Exhibits A, F, G, and H].

B. **During the Closing of the Vehicle Purchase, T&J Presents the Transactional Documents Individually to Each Customer for His/Her Review, Reading, and Questioning.**

A trained CNAC representative handles the "closing" on each customer's purchase, which includes the individual presentation of a number of documents for the customer's review and signature. The documents presented include: a power of attorney for vehicle registration and license, federal odometer statement, Ohio temporary registration application, Best Extended Service Agreement (if applicable), Buyer's Order, Retail Installment Contract and Security Agreement, insurance responsibility form, Buyer's Guide, check list, and customer survey questionnaire. [R. 49, Exhibits D, at 42-43, and M].

At the Sandusky dealership, the CNAC representative handling the closing on plaintiffs' transactions was Wendell Gaddie (hereinafter, "Gaddie"). Since opening in 1995, the Sandusky dealership has had other CNAC representatives beside Gaddie. Closings at the Sandusky dealership are videotaped for training and quality assurance purposes with the customer's knowledge. [R. 49, Exhibit D]. The camera is mounted on the wall of the office and a sign is on the table.

Plaintiffs allege that defendants follow a deliberate, standardized procedure in each vehicle purchase. While each transaction is a separate and unique event (as determined by the purchaser, vehicle, and salesman), a standard procedure is utilized to provide customers with an opportunity to read, review, and question the transactional documents before signing them. This is amply demonstrated in the videotape of plaintiffs' own, individual transactions, and videotapes of other putative class members. [R. 8, Exhibit C; R. 31; R. 41, Exhibit M].

As shown in the videotapes, Gaddie provided a brief explanation of each document upon presentation, advised plaintiffs to ask questions concerning the documents presented for their review and signature, and individually presented each document for plaintiffs' review and signature.[4] Plaintiffs had an opportunity to fully review and read each document before signing, could ask questions about the documents before signing, and were not the subject of pressure tactics to induce their signatures. [R. 8, Exhibit C].

Gaddie attempts to answer customers' questions if he is able. If a customer asks a question that is outside his knowledge or expertise, he attempts to obtain an answer from someone more knowledgeable. The videotape reveals that Gaddie answered each and every question raised by plaintiffs, and spent between twenty and thirty minutes with each plaintiff in reviewing their documentation. [R. 8, Exhibit C].

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[4] Plaintiffs' complaints alleged that defendants "fan" documents in front of customers with only the signature lines exposed so as to prevent document review. [R. 1, at ¶¶15-16; R. 17, at ¶¶15-16]. There is no mention of this allegation in plaintiffs' brief. As demonstrated by the record, including the videotapes, there was never any evidence to support plaintiffs' "fanning" allegation. [R. 8, Exhibit C; R. 41, Exhibits B, D, and M].

C. **Plaintiffs Had an Opportunity to Individually Read and Review the Arbitration Agreements and Had an Opportunity to Ask Any Questions About the Agreements.**

As shown in the videotapes, Gaddie individually presented a separate, written arbitration agreement to plaintiffs for their review, questioning, and signature.[5] The arbitration agreements were in writing, set forth on pages separate from the other documentation, were in normal and bold-faced type, and were not buried in small print in the other transactional documentation. [R. 1, Exhibits 3 and 4; R. 17, Exhibits 3 and 4]. Docherty Motors did not begin utilizing written arbitration agreements until late 1997.

At the time of presenting the arbitration agreement to Stout, Gaddie provided a hypothetical, but practical, example of how the agreement could be invoked. He did not describe the arbitration agreement as a "free benefit." Gaddie did not utilize a hypothetical example in his explanation of the agreement to Brown. [R. 8, Exhibit C].

As evidenced by the videotape, plaintiffs read and signed the agreements, and had an opportunity to ask Gaddie any questions about the agreements. In particular, the videotape reveals that, of the various documents in her transaction, Brown spent the longest time reviewing the arbitration agreement before signing. [R. 8, Exhibit C].

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[5] Not all customers at Docherty Motors from 1993 to 1998 were presented with arbitration agreements for signature. In fact, some deal jackets lack an executed arbitration agreement by the parties. [R. 28, Exhibit 5, Affidavit of Terry Hall; R. 49, Exhibit M].

The written arbitration agreements in plaintiffs' transactions differ in their language[6] and in the neutral, unbiased third-party facilitating the arbitration.[7] However, both agreements require arbitration of plaintiffs' current disputes.

D. **T&J's Extension of Credit Is Not Conditioned Upon a Customer's Decision to Purchase (or Not Purchase) an Extended Service Agreement.**

As clearly set forth in the Buyer's Guide, vehicles purchased at Docherty Motors come with a limited warranty, covering certain items, which lasts for three months or 3,000 miles, whichever comes first. As indicated on the Buyer's Guide, customers may purchase an extended service agreement, which covers the same items as the limited warranty, but lasts for a longer term. The duration and price of the extended service agreement have fluctuated over the years. [R. 49, Exhibits H, I, and K].

The extension of credit is not conditioned upon a customer's decision to purchase the extended service agreement. Customers need not purchase the extended service agreement. Customers have purchased vehicles from

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[6] Under Brown's agreement, the only dispute not subject to arbitration is a claim by defendants that she failed to make payments on a timely basis in compliance with the contracts. Under Stout's agreement, the only claims not subject to arbitration were claims under $10,000, and claims relating to repossession and replevin of the vehicle.

[7] Under Brown's agreement, any arbitration is to be conducted through the Better Business Bureau ("BBB"). Under Stout's agreement, any arbitration is to be conducted through the American Arbitration Association ("AAA").

Docherty Motors, and financed their purchase through T&J, without the purchasing the extended service agreement. There is no financial incentive for defendants' employees if a customer purchases an extended service agreement. [R. 49, Exhibits A, B, D, H, and I].

The written extended service agreement (if selected by the customer) is presented to each customer for his/her review and signature. The customer also acknowledges purchasing the extended service agreement on a number of transactional documents, including the Buyer's Guide, Buyer's Order, and Retail Installment Contract and Security Agreement. These documents clearly set forth in the terms and purchase price of the extended service agreement. [R. 8, Exhibit C; R. 49, Exhibits D, J, K, L, and M].

Plaintiffs each purchased an extended service agreement, lasting eighteen months or 18,000 miles, for $895. In their transactions, plaintiffs acknowledged purchasing the extended service agreement on the Buyer's Guide, Buyer's Order, and Retail Installment Contract, and understood that they were paying an additional amount for the service agreement. A number of customers have utilized the extended service agreement for repairs, including Brown, who received a complete engine replacement. [R. 41, Exhibits C, D, E, and H; R. 49, Exhibits N, O, P, Q, R, and S].

E. Each Used Vehicle Purchase at Docherty Motors Is a Separate and Unique Transaction.

In an attempt to extort a class settlement that is disproportionate to the value of their actual claims, plaintiffs seek to characterize each and every vehicle purchase at Docherty Motors as a carbon copy of every customer's experience. As part of their boilerplate allegations, plaintiffs maintain that every purchaser of a used vehicle from Docherty Motors since the date of its operation has "had to have their

vehicle repaired at a great cost and inconvenience to them." [R. 17, at ¶26]. This is untrue and unproven in the record.

Leaving aside the sheer improbability of such an allegation, not all purported class members have had their vehicles repaired "at a great cost" to them. Their problems, if any, have been as divergent as the makes and models of the vehicles that they purchased. Some have paid for their repairs out-of-pocket. Others have had significant repairs, such as complete engine replacement, made by Docherty Motors at no cost to them, minus the deductible. Others have had no problems at all. Some customers are still driving their vehicles. Others are not. [R. 41, Exhibits A, B, C, D, E, H, and L]. More than 35% of Docherty Motors' customers are repeat or referred buyers.

While defendants may utilize certain "form" documents in each transaction, one cannot broadly generalize about what transpired in every transaction conducted at Docherty Motors since its inception in 1995. Each vehicle purchase is a separate, unique transaction due to: (1) the vehicle purchased, including its make, model, mileage, year, and purchase price; (2) the driver of the vehicle; (3) the purchaser's preferences; (4) the salesmen involved; and (5) the documents involved. [R. 41, Exhibits A, B, C, D, E, H, and L].

Each customer has specific needs and different concerns when purchasing a used vehicle. Some want additional protection against possible repairs. Some do not. Accordingly, plaintiffs (as well as prospective class members) asked their respective salesmen different questions (if any) about the vehicles, transactional documents, warranties, and the extended service agreement. Some customers, including plaintiffs, had previously purchased service contracts in association with prior consumer transactions, including the purchase of motor vehicles. [R. 41, Exhibits A, B, C, D, E, H, and L].

SUMMARY OF THE ARGUMENT

Plaintiffs' appeal arises from two separate orders entered by the district court. The first order compels plaintiffs to submit their individual claims to binding arbitration as freely agreed by the parties. The district court correctly determined that the FAA, not Ohio substantive law, governs the enforceability of the written arbitration agreement, and properly granted defendants' motion to compel arbitration.

There is no evidence in the record that the arbitration agreements constitute unenforceable "adhesion" contracts. Rather, the record clearly reflects that: (1) plaintiffs had an opportunity to read and review their individual written arbitration agreement; (2) each plaintiff read their individual arbitration agreement; (3) each plaintiff had an opportunity to ask questions concerning their individual arbitration agreement; and (4) each plaintiff signed the arbitration agreement. The evidence supports the district court's conclusion that the parties agreed to arbitrate the disputes before this Court.

Additionally, Plaintiffs presented no evidence to the district court as to the alleged unconscionability of these agreements, presented no evidence as to the actual arbitration rules for the Better Business Bureau or American Arbitration Association, and presented no evidence as to the actual arbitration fees for each organization.

Finally, the arbitration agreements do not defeat the purposes of CSPA or TILA, and do not leave plaintiffs without a legal remedy. An arbitrator still has the power to award plaintiffs relief under CSPA, TILA, and common-law fraud. An arbitrator could apply the applicable law, assess plaintiffs' claims, and award plaintiffs compensatory damages, statutory damages, attorney's fees, or punitive damages, if the underlying facts so warranted.

The second order addressed the propriety of class certification. The district court properly exercised its discretion by denying plaintiffs' motion for class certification for a number of reasons. First, the district court properly concluded that each purported class member's claim arises out of an individual and unique consumer transaction, rooted in individual proof of injury, the particular cause of each injury, and individual aspects of each consumer transaction. Second, the district court properly concluded that plaintiffs' claims are not typical of the purported class members. Third, the district court properly concluded that plaintiffs are not adequate representatives of the proposed class.

Plaintiffs are asking this Court to ignore individual negotiations and gloss over individual details of each transaction that warrant against class certification. Each transaction dealt with different cars, different warranties, different distinct repairs, if any, some under warranty and some not under warranty. The individual issues of alleged fraud, signatures, documents, witnesses, and videotapes cannot all be generalized.

LAW AND ARGUMENT

I. THE DISTRICT COURT PROPERLY GRANTED DEFENDANTS' MOTION TO COMPEL ARBITRATION.

A. Standard of Review

This Court reviews a district court's ruling on a motion to compel arbitration *de novo*. *See Ferro Corp. v. Garrison Industries*, 142 F.3d 926, 931 (6th Cir. 1998).

B. Plaintiffs' Arbitration Agreements Are Enforceable Under the FAA.

The parties agree that the arbitration agreements are governed by the FAA. Section 2 of the FAA provides that written agreements to arbitrate in a contract involving transactions in interstate commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. Section 4 gives district courts authority to compel arbitration when a party neglects or refused to comply with an arbitration agreement. 9 U.S.C. §4.

The FAA establishes a federal policy favoring arbitration, and requires district courts to rigorously enforce arbitration agreements. The FAA was designed to override the judiciary's long-standing refusal to enforce arbitration agreements, and to place such agreements on the same footing as other contracts. The purpose of the FAA was to relieve court congestion and provide parties with a speedier and less costly alternative to litigation. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270, 280 (1995); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 52-54 (1995); *Volt v. Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 282 (1987); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984); *Ferro Corp.*, 142 F.3d at 932, 938.

Upon a party's request to compel arbitration, a district court has four tasks: (1) to determine whether the parties agreed to arbitrate the dispute; (2) determine the scope of the agreement; (3) if federal claims are asserted, to determine whether Congress intended the claims to be subject to arbitration; and (4) if some, but not all of the claims are arbitrable, to determine whether to stay the proceedings pending arbitration. *Wedding v. University of Toledo*, 884 F. Supp. 253 (N.D. Ohio 1995); *H & M Charters, Inc. v. Reed*, 757 F. Supp. 859, 864 (S.D. Ohio 1991);*Compuserve, Inc. v. Vigny Int'l Finance, Ltd.*, 760 F. Supp. 1273 (S.D. Ohio

1990). Plaintiffs do not find fault with the district court's findings and conclusions on the second and fourth issues. The district court reviewed all four issues, and correctly resolved each issue in favor of arbitration.

1. **The District Court Properly Concluded That the Parties Entered a Written Agreement to Arbitrate.**

Plaintiffs incorrectly contend that the district court erred in compelling arbitration because there was no "agreement" between the parties to arbitrate their disputes. [Appellants' Brief, at 12]. The record, especially the videotapes, demonstrate that the parties did agree to arbitrate their disputes. Plaintiffs were knowledgeable consumers, and had each previously purchased used vehicles. Plaintiffs each engaged in lengthy discussions with Gaddie, in which he individually sat and presented the transactional documents for their review and questions before execution. Gaddie encouraged plaintiffs to ask questions if they did not understand any of the transactional documents. [R. 8, Exhibit C].

Gaddie also provided plaintiffs a brief explanation of each document upon presentation. If plaintiffs asked a question about the transaction, Gaddie answered the inquiry and provided further explanation. If he could not answer a particular question, he would have sought out a more knowledgeable source for the information. [R. 8, Exhibit C].

When Gaddie presented the arbitration agreement to Stout, in an attempt to explain the document, he provided a real-world scenario of how the agreement could be invoked. He did not provide a pragmatic example to Brown. While plaintiffs try to characterize this as a "misleading" explanation, Gaddie had no affirmative duty to explain the legal effect of an arbitration agreement. Additionally, parties can still be bound by a written arbitration agreement, even if

neither party fully understanding the ramifications. Nonetheless, if plaintiffs had asked questions about the agreement outside of Gaddie's knowledge, he would have sought an answer from a more knowledgeable source. [R. 8, Exhibit C].

The record also reveals that: (1) the arbitration agreements were set forth in separate documents, in regular and bold-print type, and were not buried in small print in the transactional documents; (2) plaintiffs read and reviewed the arbitration agreements; (3) plaintiffs had an opportunity to ask Gaddie questions about the agreements; (4) plaintiffs did not ask Gaddie any questions about the agreements; and (5) plaintiffs signed the agreements, thus representing that they understood the agreements. The agreements expressly and clearly state that the parties agree to resolve their disputes through binding arbitration through a neutral, unbiased, and respected third-party.

Accordingly, the district court properly concluded that the parties agreed to arbitrate their disputes in accordance with the terms of the written arbitration agreements.

2. **The District Court Correctly Held That, Pursuant to the FAA, Congress Intended Plaintiffs to Arbitrate the Claims Raised Against Defendants.**

A district court should not deny a request for arbitration unless the it may say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute. Any doubt regarding the applicability of an arbitration clause is to be resolved in favor of arbitration. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983); *Ferro Corp*, 142 F.3d at 932.

The arbitrability of a dispute is determined on the basis of the contract entered into by the parties. If a contract evidences an intent to refer any disagreements to arbitration, a party cannot unilaterally decide to seek redress in the courts at the last minute. Parties are required to arbitrate their disputes absent the most extenuating of circumstances. *Southland Corp.*, 465 U.S. at 24;*Dean Witter Reynolds, Inc. v. McCoy, 995 F.2d 649 (6th Cir. 1993)*; *Sutton v. Cleveland Bd. of Educ.*, 958 F.2d 1339 (6th Cir. 1992); *Asper v. Shearson American Express, Inc.*, 768 F.2d 106 (6th Cir. 1985).

The district court correctly held that plaintiffs' claims were subject to arbitration under the FAA. Under both version of their complaints, plaintiffs affirmatively sought declaratory relief under the FAA. Further, the arbitration agreements require plaintiffs to arbitrate all disputes arising "under the terms of the `Contracts.'" Plaintiffs' claims for fraud, violations of CSPA, and TILA relate to the purchase of their vehicles and arise under their contracts with defendants. Finally, these claims address whether the entire contract was fraudulently induced. Accordingly, these claims fall within the scope of the FAA.

A district court's duty to enforce an arbitration agreement under the FAA is not diminished when a party bound by the agreement raises claims founded on statutory rights. *McMahon, supra.* (RICO);*Daisy Mfg. Co. v. NCR Corp.*, 29 F.3d 389 (8th Cir. 1994) (RICO);*Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) (RICO); *Matthews v. Rollins Hudig Hall Co.*, 72 F.3d 50 (7th Cir. 1995) (ADEA); *Kropfelder v. Snap-On Tools Corp.*, 859 F. Supp. 952 (D.Md. 1994) (ERISA);*Dorsey v. H.C.P. Sales, Inc.*, 46 F. Supp.2d 804, 808, n.5 (N.D. Ill. 1999) (TILA) (cited on page 13 of Appellants' Brief); *Goodwin v. Ford Motor Credit Company*, 970 F. Supp. 1007 (M.D. Ala. 1997) (TILA). Nothing in the FAA for implies a presumption against

arbitration of statutory claims, including those protecting consumer interests. Plaintiffs' TILA claims also presumptively involve interstate commerce, thus placing these claims within the scope of the FAA. *Mitsubishi Motors v. Soler Chrysler-plymouth, Inc.*, 473 U.S. 614, 626 (1995).

Federal courts, including the United States Supreme Court, have also routinely held that the FAA applies to consumer complaints, especially those made under TILA. *Dobson*, 513 U.S. at 280 (residential termite extermination contract);*Dorsey*, 46 F. Supp.2d at 808, n.5 (home improvement services); *Hill*, 105 F.3d at 1147 (personal computer); *Goodwin*, 970 F. Supp. at 1007 (motor vehicles). In response, plaintiffs only cite one federal court opinion that rejects application of arbitration agreements in TILA dispute, which is easily distinguishable from the case at bar, as plaintiffs have presented no evidence that: (1) the arbitration provided in plaintiffs' agreements are an ineffective and inaccessible forum; or (2) the arbitration fees or procedures are substantively unfair. Additionally, plaintiffs' arbitration agreements specify which organization's rules will govern the arbitration, *i.e.*, AAA or BBB. [Appellants' Brief, at 18-19, *citing Randolph v. Green Tree Financial Corp.*, 178 F.3d 1149, 1157-58 (11th Cir. 1999)].[8]

Accordingly, the district court properly held that the FAA required arbitration of plaintiffs' claims.

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[8] Notably, in *Randolph*, the Eleventh Circuit refused to "decide whether the TILA precludes all arbitration agreements." *Randolph*, 178 F.3d at 1149. Implicit in this statement is that the FAA permits arbitration of some TILA disputes, depending upon the agreement.

3. Plaintiffs' Arbitration Agreements Are Conscionable, and Are Not Subject to Ohio's Substantive Law on the Enforceability of Arbitration Agreements.

Plaintiffs contend that the enforceability of the arbitration agreements is governed by Ohio case law, and that their agreements are unenforceable as against Ohio public policy. While a district court may look to State law to determine if an arbitration agreement was actually formed, the FAA does not permit a district court to utilize substantive State law to determine the conscionability of the agreement itself.

The Sixth Circuit has recognized only two limitations on the enforceability of arbitration agreements subject to the FAA: (1) they must be part of either a maritime contract or a contract dealing with interstate commerce; and (2) arbitration agreements may be revoked "upon grounds as exist at law or in equity for the revocation of any contract." Further, the Supreme Court sees "nothing in the act indicated that the broad principle of enforceability is subject to any additional limitations of [S]tate law." *Ferro Corp.*, 142 F.3d at 932, *citing Southland Corp.*, 465 U.S. at 10-11.

Where an agreement to arbitrate has not been fraudulently induced, all other issues falling within that agreement are to be sent to arbitration. Only claims for fraudulent inducement of the arbitration clause itself may be heard by the district court. Plaintiffs' allegations of fraudulent inducement in the entire contracts are to be decided through arbitration. *Prima Paint Corp.v. Flood & Conklin Mfg. Co.*, 388 U.S. 403-04 (1967); *Ferro Corp.*, 142 F.3d at 933, 935.

The Supremacy Clause does not permit Ohio to mandate judicial resolution of disputes when the parties agree to arbitration under the FAA. The FAA withdraws power

from the States to require a judicial forum for resolution of claims which the contracting parties agreed to arbitrate. For cases under the FAA, this statute governs all aspects of arbitration procedure and preempts inconsistent State law. *See Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 688 (1996); *Moses H. Cone*, 460 U.S. at 24; *see Dobson*, 513 U.S. at 270-71; *Southland Corp.*, 465 U.S. at 10.

Plaintiffs contend that their arbitration agreements are unenforceable adhesion contracts, and rely upon the Ohio Supreme Court's decision in *Williams v. Aetna Financial Company*, 83 Ohio St.3d 464 (1998), *cert. denied*, 119 S.Ct. 1357 (1999). The *Williams* decision is not dispositive of the issues raised in this litigation. In *Williams*, the Ohio Supreme Court construed its obligation to compel arbitration under R.C. 2711.01, *et seq.*, Ohio's Arbitration Act. This obligation is not present in the instant case.

However, even under the articulated principles of unconscionability set forth in *Williams*, the district court correctly compelled arbitration. In Ohio, a party sufficiently states a claim that an arbitration agreement is unconscionable or takes the form of an adhesion contract by showing that: (1) the contract terms are one-sided or unreasonably unfavorable to the other party; (2) that disparity between the parties' bargaining power denies the less advantaged party meaningful choice in accepting the terms of the contract; and (3) the less advantaged party cannot obtain their "desired product or services except by acquiescing in form contract." *Williams*, 83 Ohio St.3d at 482.

The district court correctly held that the arbitration agreements were not unconscionable or adhesion contracts under this standard. Both agreements required submission to legitimate arbitration panels. Plaintiffs presented no evidence that AAA or BBB would not be able to fairly adjudicate their claims, presented no evidence as to the applicable rules for each organization, and presented no evidence as to the fees

associated with arbitration before either organization. Unlike *Williams*, without the applicable rules and fees, there is insufficient evidence to allow plaintiffs to avoid their agreement to arbitrate.

However, even if plaintiffs did present such evidence, the FAA does not authorize federal courts to evaluation plaintiffs' arbitration costs on a case-by-case basis when determining whether to compel arbitration. "Whatever may be said pro and con about the cost and efficiency of arbitration . . . is for Congress and the contracting parties to consider." A consumer may not escape his or her contractual obligation to arbitrate her disputes by later complaining about the cost. *Dorsey*, 46 F. Supp.2d at 807-08;*Hill, 105 F.3d at 1151*;*Green Tree Financial Corp. Alabama, et al. v. Randolph*, 2000 WL 1803919 at *1 (U.S. Dec. 1, 2000).

Additionally, plaintiffs presented no evidence that defendants would have refused to sell the vehicles had they refused to sign the arbitration agreements. Plaintiffs also presented no evidence that they were only able to purchase similar vehicles at Docherty Motors, and that they could only purchase similar vehicles by agreeing to the arbitration agreements.[9]

Plaintiffs also contend that the arbitration agreements unjustly abrogate their rights under the CSPA and other statutes. [Appellants' Brief, at 16]. Plaintiffs also allege that the arbitration agreements attempt to eliminate any and all legal causes of action the consumer may have for any violations of state or federal consumer protective or lending laws against the defendants. These allegations lack support in

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[9] In fact, Brown repeatedly emphasizes that she purchased and financed her vehicle at Docherty Motors due to the weekly payment schedule for her daughter, and not because she was unable to obtain financing from a traditional third-party. [R. 18, at 3].

the record. As under the CSPA, an arbitrator can still award compensatory damages, treble damages, statutory damages, punitive damages, costs, attorney's fees, and other relief accorded under the statutes through which plaintiffs seek relief. Neither arbitration agreement precludes the same relief to which plaintiffs would be entitled to in a judicial forum. The arbitration agreements merely provide for the appropriate forum for resolving any disputes, which is consistent with the purpose and intent of the FAA. Notably, plaintiffs did not present any evidence concerning the rules or costs governing their arbitrations. *Green Tree Financial Corp. Alabama, et al. v. Randolph*, 2000 WL 1803919 at *1 (U.S. Dec. 1, 2000).

II. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION BY DENYING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION.

A. Standard of Review

This Court reviews a district court's ruling on class certification to see if an abuse of discretion occurred. The district court retains broad discretion in determining whether an action should be certified as a class action, and its decision, based upon the particular facts of the case, should not be overturned absent a showing of abuse of discretion. *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1198 (6th Cir. 1988).

B. The District Court Properly Exercised Its Discretion By Denying Plaintiffs' Motion for Class Certification.

Plaintiffs sought to certify a class comprising of **all** Docherty Motors from the beginning of its operation. Plaintiffs alleged that defendants had defrauded **every member** of this class by selling them a used vehicle with concealed damage, and that **every member** had incurred substantial repairs to remedy the damage. [R. 1, at ¶¶8-34; R. 17, at ¶¶8-34].

Rule 23 of the Federal Rules of Civil Procedure governs class action lawsuits. Fed.R.Civ.P.23. A district court may certify a class if all the procedural requirements of Rule 23(a) are met, and if certification is appropriate under Rule 23(b)(1), (b)(2), or (b)(3). Rule 23(a) sets forth the following four prerequisites to class certification: (1) the class must be so numerous that "joinder of all members is impracticable"; (2) there must be "questions of law or fact common to the class"; (3) the claims of the representative party must be "typical" of those of the class; and (4) the representative party must "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a).

The party seeking class certification bears the burden of proof. *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982); *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996). District courts must conduct a rigorous analysis into whether the prerequisites are met before certifying a class. *Sprague v. General Motors Corp.*, 133 F.3d 388, 397 (6th Cir.), *cert. denied*, 118 S.Ct. 2312 (1998); *In re American Med. Sys., Inc.*, 75 F.3d at 1078-79;*Kutschbach v. Davies*, 885 F. Supp. 1079 (S.D. Ohio 1995); *Jackshaw Pontiac, Inc. v. Cleveland Press Pub. Co.*, 102 F.R.D. 183, 196 (S.D. Ohio 1984). Under this standard, the district court properly exercised its discretion by denying plaintiffs' motion for class certification.

1. **The District Court Properly Exercised Its Discretion By Finding That Plaintiffs' Claims Were Not Typical of the Proposed Class.**

Under Fed. R. Civ. P. 23(a)(3), a party seeking class certification must show that his or her claims are typical of other potential class members. Fed. R. Civ. P. 23(a)(3). Rule 23(a)(3) exists to ensure that the claims of the representative party are similar enough to the claims of the class so that the representative will adequately represent all members of the class. Fed. R. Civ. P. 23(a)(3). Any inquiry into typicality under Rule 23(a)(3) requires a comparison of the claims or defenses of the representative with the claims or defenses of the class. *See Hiatt v. County of Adams, Ohio*, 155 F.R.D. 605, 609 (S.D. Ohio 1994).

"[A] class representative must be part of the class and `possess the same interest and suffer the same injury' as the class members." *Falcon*, 457 U.S. at 156. This Court has described the typicality requirement as follows:

> Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct .
>
> . . .

Sprague, 133 F.3d at 399. This Court has also summarized this legal standard simply: "[a]s goes the claim of the named plaintiff, so go the claims of the class." *Id.*

The district court properly exercised its discretion by finding that plaintiffs failed to show a sufficient relationship between their experiences and the diversity of experiences of putative class members. Plaintiffs' claims are tied to specific facts about warranties, each vehicle's condition at the time of sale, each buyer's knowledge at the time of sale, and repairs and whether those repairs are defendants' responsibility.

Plaintiffs and the putative class members purchased different vehicles, from different salesman, for different prices and reasons. Each vehicle had different prior owners and an unique history of use and care.

Plaintiffs and putative class members purchased their respective vehicles under different circumstances. Plaintiffs had different financing and lending needs. Some putative class members kept their financing obligation, others did not. Stout financed his vehicle through T&J due to a poor credit record; whereas, Brown did so because of the weekly payment schedule for her daughter

Plaintiffs both purchased service contracts in prior consumer transactions, including motor vehicles; whereas, some putative class members had never purchased a motor vehicle or service contract before. Some putative class members chose to purchase vehicles without the extended service agreement. As noted by another district court in the Sixth Circuit, under similar facts, a customer's individual decision to purchase (or not purchase) an extended service agreement militates against class treatment. *Peters v. Cars to Go, Inc.*, 184 F.R.D. 270 (W.D. Mich. 1998).

Plaintiffs have had differing difficulties with their vehicles, and have received different responses to their requests for repairs. Stout's alleged problems with his Camaro do not affect its performance, and have not necessitated repairs; whereas, Brown's alleged problems have necessitated repairs, including a complete engine replacement covered under Docherty Motors' extended service agreement. Accordingly, the adequate remedy for each putative class member will differ. Some putative class members do not claim any problems with their vehicles, while others may simply require repairs to be satisfied.

In sum, simply because Plaintiffs may be able to prove that s/he was injured, it does not necessarily follow that <u>all</u> Docherty Motors customers from the beginning of time will

be able to prove their case. The substantial differences among putative class members described above militate against a finding of typicality. Accordingly, the district court properly held that plaintiffs had failed to satisfy the typicality requirement.

2. The District Court Properly Exercised Its Discretion By Finding That Plaintiffs Were Not Adequate Representatives for the Class.

Under Rule 23(a)(4), a plaintiff seeking to represent a class must show that s/he will fairly and adequately represent and protect the interests of the class. Fed.R.Civ.P.23(a)(4). This requirement is "essential to due process, because a final judgment in a class action is binding on all class members." Adequacy of representation is measured by two standards. First, class counsel must be qualified, experienced, and generally able to conduct the litigation. Second, class members must not have interests that are antagonistic to one another. *In re American Med. Sys.*, 75 F.3d at 1083; *Jackshaw Pontiac*, 102 F.R.D. at 191.

The district court correctly held that the named plaintiffs have interests that are antagonistic to the proposed class members. Interests are antagonistic when there is evidence that the representative plaintiffs appear unable to "vigorously prosecute the interests of the class." *In re American Med. Sys.*, 75 F.3d at 1083. Inability to prosecute the class' interest may arise due to a conflict of interest with other members of the class. *Id.* A representative plaintiff also should have a stake in the outcome of the litigation and should be familiar with the facts of the case. *Alexander Grant & Co. v. McAlister*, 116 F.R.D. 583, 589 (S.D. Ohio 1987).

Some of the putative class members, including Brown, have obtained repairs and treatment that have differed from other class members. Plaintiffs assume that the district

court's corollary finding was based upon settlement discussions;[10] however this is not the case. Brown has received a complete engine replacement and other repairs under the extended service agreement. Despite falling extremely behind in his payments, Stout has been able to arrange for alternative schedules from T&J without an explanation. Despite these arrangements, Stout has been deficient in his payments, and defendants have still not repossessed his vehicle. Not all putative class members have received such treatment. Because defenses and mitigation may be utilized against plaintiffs, they are not adequate representatives of the class.

Finally, because plaintiffs' claims arise from different transactions and injury, absent class members, who allege greater or lesser harm, may lose the benefit of having the facts of their separate cases adequately presented. For example, the proper statute of limitations will be a heavily contested issue in any trial of putative class member claims.[11] Plaintiffs, unlike some putative class members, appear to have

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[10] There is no evidence on the record to support plaintiffs' reference to settlement discussions at the district court on May 27, 1999. Plaintiffs' characterization of the district court's handling of the settlement conference is erroneous, and irrelevant to the issues at bar. Defendants acknowledge that, at the settlement conference, they reiterated their longstanding offer to refund plaintiffs' money and accept the vehicles back, or to make necessary repairs.

[11] Plaintiffs seek to represent a class of customers dating back to 1993. The applicable statute of limitations for a TILA claim is one year, and the applicable statute of limitations for a fraud claim under Ohio law is four years. Any "tolling" of these statutes of limitations would involve presentation of evidence of each individual transaction, what each customer knew or should have known, and at what time s/he gained this knowledge.

filed their claims within the applicable statute of limitations for their claims. However, given their quest for a class action, plaintiffs have little incentive to emphasize the individual facts in each case that may allow putative class members to preserve their claims.

3. **The District Court Properly Held That a Class Action Would Not Serve the Purposes of Real Efficiency and Judicial Economy, as Individual Issues Predominate Over Common Factual or Legal Questions.**

The principal purpose of a class action is to achieve real efficiency and judicial economy. *Falcon*, 457 U.S. at 159. The requirement that "common" issues predominate over individual issues assures that the goal of judicial economy is served in fact, not just in theory. *In re American Med. Sys.*, 75 F.3d at 1085.

As plaintiffs' claims sound overwhelming in fraud, a core, factual issue in this litigation is whether each individual putative class member relied upon representations or failures to disclose and, if so, what damages proximately resulted. *Burr v. Board of County Comm'rs of Stark County*, 23 Ohio St.3d 69, 73 (1986); *Black v. Cosentino*, 117 Ohio App.3d 40, 44 (1996). Issues of knowledge and reliance require individual proofs which limit class-wide treatment of fraud-based claims. Because reliance permeates plaintiffs' claims, individual issues predominate over common issues, thus rendering class certification inappropriate. *Andrews v. American Tel. & Tel. Co.*, 95 F.3d 1014, 1023-25, *reh'g denied*, 104 F.3d 373 (11th Cir. 1996); *Castano v. American Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996); *Mack v. GMAC*, 169 F.R.D. 671, 680 (M.D. Ala. 1996).

To the extent that plaintiffs' TILA claims raise any additional issues,[12] the district court also correctly determined that individual issues predominate over common issues, thus rendering class certification inappropriate. As a Michigan district court observed in denying class certification under similar circumstances:

> The nature of the VSC [vehicle service contract] present a major obstacle to the commonality requirement because unlike other types of charges, such as a "non-filing fee". . . which borrowers incur only because they are imposed by creditors, some purchasers may actually choose to purchase a VSC in order to minimize used car repair costs. For this reason, it does not automatically follow that a person who purchased a vehicle and a VSC from Cars on credit was required to purchase the VSC. In fact, the evidence submitted by Cars shows that in 1997, it sold 100 vehicles without service contracts.

Peters, *supra*, (cited at R. 45, at 11, n.6).

Any resolution of the putative class' TILA claims involve individual determinations as to: (1) what documents the customer reviewed; (2) the manner in which the documents were presented; (3) representations made to each individual customer; and (4) whether the customer selected

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[12] Plaintiffs' TILA claims are based upon defendants' alleged inclusion of the price of the extended service agreement into the finance charge without notifying customers that purchase of the extended service agreement was allegedly required for an extension of credit. Such claims, by their nature, involve similar issues to their fraud claims, *i.e.*, misrepresentations, reliance, and accompanying damages.

the extended service agreement or, as plaintiffs allege, was "tricked" into accepting the extended service agreement.

Accordingly, the district court properly held that class treatment was inappropriate as individual issues predominate over common issues among the putative class.

CONCLUSION

For the foregoing reasons, defendants-appellees, J.D. Byrider a.k.a. Docherty Motors, and T&J Acceptance Corporation d.b.a. CarNow Acceptance Corporation, respectfully urge this Court to affirm the rulings entered by the district court: (1) compelling arbitration of plaintiffs' claims; and (2) denying class certification pursuant to this Court's recent decision in *Green Tree Financial Corp. Alabama, et al. v. Randolph*, 2000 WL 1803919 at *1 (U.S. Dec. 1, 2000).

Respectfully submitted,

LOUIS PAISLEY (0017498)
GARY W. JOHNSON (0017482)
Weston Hurd Fallon Paisley & Howley, L.L.P.
2500 Terminal Tower
50 Public Square
Cleveland, OH 44113-2241
Telephone: (216) 241-6602
Facsimile: (216) 621-8369
Attorneys for Defendants-Appellees